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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re P.G., a Person Coming
Under the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

P.G.,

Defendant and Appellant.

B283697

(Los Angeles County
Super. Ct. No. PJ52395)

APPEAL from an order of the Superior Court of Los Angeles County, Fred Fujioka, Judge. Affirmed as modified in part and reversed in part.

Torres & Torres and Tonja R. Torres, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Noah P. Hill, Deputy Attorney General, and Nima Razfar, Deputy Attorney General, for Plaintiff and Respondent.

The juvenile court sustained a petition under Welfare and Institutions Code section 602 alleging that Pablo G. committed a battery against a security officer in violation of Penal Code section 243, subdivision (b). Pablo G. appeals the adjudication order, contending that: (1) the prosecution presented insufficient evidence that the victim was a security officer within the meaning of Penal Code section 243; and (2) the court abused its discretion when it denied his request for a continuance to obtain the presence of a witness.

We agree there is insufficient evidence to support the court's finding that Pablo G. committed a battery against a security officer, and therefore modify the adjudication order to the lesser included offense of simple battery under Penal Code section 242. We also conclude that the trial court did not abuse its discretion in denying the continuance.

FACTUAL AND PROCEDURAL HISTORY

On March 3, 2017, a petition was filed under Welfare and Institutions Code section 602 alleging that then 13-year-old Pablo G. committed the crime of battery on a peace officer in violation of Penal Code section 243, subdivision (b).¹ Pablo denied the petition, and the court conducted a contested adjudication.

¹ Unless otherwise noted, all further statutory citations are to the Penal Code.

A. Witness Testimony

1. Hector Najera

The alleged victim of the crime, Hector Najera, served as a school safety officer at Van Nuys Middle School. Najera testified that, on September 21, 2016, he was summoned to a classroom by Martin Crowe, a school counselor. When Najera arrived at the classroom, he observed Pablo and the teacher engaged in a verbal altercation. Najera stated that he had interacted with Pablo on numerous prior occasions regarding “discipline or him being defiant with the teachers.”

Najera spoke with the teacher, who indicated that Pablo was refusing to follow instructions. Najera asked Pablo to leave the classroom so that they could discuss the situation. Although Pablo initially refused, Najera and Crowe eventually convinced him to come into the hallway. Najera stated that Pablo looked “very angry,” pacing back and forth while “talking profanities” about the teacher.

Pablo suddenly attempted to re-enter the classroom, but Najera blocked the door, and directed him to the Dean’s Office. Pablo told Najera to “get out of the way,” warning that Najera would “not be able to stop him.” Pablo then made a fist, and punched Najera in the chest. Najera tried to restrain Pablo, who continued to “fight” and “kick.” Najera then pushed Pablo to the ground, and placed him in handcuffs.

On cross-examination, Najera confirmed he was not a police officer, but rather served as a “non-sworn” civilian employee for the Los Angeles School Police Department, an entity under the Los Angeles Unified School District. He further clarified that there were other “sworn [school] police officers” he could call if law enforcement presence became necessary.

2. *Testimony of the responding officers*

Los Angeles School Police Department officer Erin Harvey testified that, on the afternoon of September 21, 2016, he was called to Van Nuys Middle School. When Harvey arrived, he spoke with Najera, who told Harvey that he had blocked Pablo from entering the classroom, and that Pablo then “took a fighting stance with a clenched fist and struck [Najera] once in the chest.” Harvey took Pablo into custody, transported him to a local police station and obtained a written statement from him.²

A second officer, Alvin Durham, testified that he had administered a “*Gladys R.* questionnaire” to Pablo to determine whether he appreciated the wrongfulness of his suspected criminal activity. (See generally *In re Gladys R.* (1970) 1 Cal.3d 855, 862 [“a child under the age of 14 years does not commit a crime in the absence of clear proof that he ‘knew its wrongfulness’”]; see also *In re Joseph H.* (2015) 237 Cal.App.4th 517, 531 [explaining that a “*Gladys R.* questionnaire” is “designed to satisfy the requirement . . . that a child under 14 appreciate the wrongfulness of his or her conduct”].) Durham stated that Pablo’s grandmother was present when he administered the questionnaire, and that Pablo had acknowledged he knew it was wrong to hit a school employee.

3. *Testimony of Pablo’s mother*

Pablo’s mother, Maura G., testified that on the date of the incident, Pablo’s grandmother notified her that Pablo had been arrested at the school and taken to the police station. Maura

² Although the prosecution attempted to elicit testimony from Harvey describing the content of Pablo’s written statement, the court sustained a defense objection on hearsay grounds.

further testified that the grandmother had picked Pablo up from the station that day because Maura was at home taking care of her other children. Maura stated that although she had taught Pablo not to hit people, he was a special education student and had difficulty understanding and remembering things.

4. The testimony of Martin Crowe

Crowe, the sole witness called by the defense, testified that, on the day of the incident, a substitute teacher had summoned him to a classroom because students were misbehaving. When Crowe arrived, he observed multiple students acting in an inappropriate manner, and asked Pablo and a female student to leave the classroom. The female student complied with his instruction, but Pablo refused. Crowe then called school safety officer Najera to assist him.

When Najera arrived, he and Crowe both asked Pablo to leave the classroom, and he eventually complied. Najera asked Pablo to accompany him to the administrative offices, but Pablo refused. According to Crowe, Pablo then started knocking on the classroom door. A teaching assistant standing inside the room started to open the door, and Pablo began pulling on the door handle. Crowe immediately entered a second door located on the other end of the classroom, and directed the teaching assistant to keep the door shut. Crowe then observed the assistant “tussle” with a person on the other side of the door, whom Crowe presumed to be Pablo. After the assistant had successfully closed the door, Crowe returned to the hallway, where he saw Najera putting handcuffs on Pablo. Crowe stated that he did not see what had occurred between Najera and Pablo prior to the handcuffs being placed on the student, and admitted that he had not witnessed Pablo swing a fist at Najera.

B. The Juvenile Court's Denial of the Defense's Request for a Continuance

After Crowe completed his testimony, defense counsel requested a recess to speak with Pablo regarding whether he intended to testify at the hearing.

Following the recess, defense counsel informed the court she had just become aware that Pablo's grandmother was a "potential witness," and requested a continuance to "get [her] in." Counsel explained that, during the recess, Pablo's mother had stated that the grandmother previously told her she spoke with Najera on the date of the incident, and that Najera said the "hitting" was "accidental on the part of [Pablo]." Counsel further explained that she had not been aware of any such conversation between grandmother and Najera, and emphasized that a continuance was necessary because the grandmother's alleged statement directly contradicted Najera's prior testimony.

The prosecution objected, asserting that the grandmother was a "main party in the case within the reports. Defense had plenty of opportunity to interview her as well as any other witness. . . . This is not an unexpected witness or someone that is beyond the scope of the evidence provided to the defense. The people see no reason to grant the continuance at this point. Defense announced ready. We proceeded."

The court denied the continuance, explaining to defense counsel: "I'm not faulting you on this at all. I accept your explanation that mom just told you. But I'm not understanding how come the mother waited until we're in the middle of the proceedings literally to let you know about this surprise witness, a witness who's readily available to mom and your client. It lacks some credibility, in my mind, as to whether or not she would be a credible witness."

Following the court's ruling, defense counsel informed the court that Pablo had elected not to testify, and that no further witnesses would be called.

C. Adjudication and Disposition

The court sustained as true the allegation that Pablo had committed battery against an officer within the meaning of section 243, subdivision (b). The court explained that "security persons are listed as designated persons under 243(b)," and that the prosecution had presented evidence that Pablo knew Najera was a school security guard. The court further explained that it found Najera's testimony regarding the incident to be "clear, honest and credible." The court further noted that there was no evidence Najera had any "motivation . . . to lie."

After reviewing the probation officer's report, the court declared Pablo a ward of the court pursuant to Welfare and Institutions Code section 602, and ordered him placed at home on probation.

DISCUSSION

A. The Evidence Is Insufficient to Support a Finding that Pablo Violated Section 243, Subdivision (b)

Pablo argues there is insufficient evidence to support the juvenile court's finding that he violated section 243, subdivision (b), which sets forth the punishment for committing a battery against various types of designated officers, including a "security officer."³ Pablo argues that, contrary to the juvenile court's

³ Section 243, subdivision (b) provides, in relevant part: "When a battery is committed against the person of a peace officer, custodial officer, firefighter, emergency medical

finding, the record shows Najera was not a “security officer” within the meaning of the statute. The Attorney General does not dispute the issue, acknowledging that Najera’s position “does not satisfy the . . . requirement of being a ‘security officer’ under section 243, subdivision (b).” We agree with the parties’ assessment.

Section 243 defines the term “security officer” to mean any person “who has the responsibilities and duties described in [Penal Code section] 831.4 and who is employed by a law enforcement agency of any city, county, or city and county.” (§ 243, subd. (f)(13).) Najera’s testimony, however, shows he was not employed by a city or county law enforcement agency, but rather was employed by the Los Angeles School Police Department, an entity that serves under the Los Angeles Unified School District.⁴ (See *In re M.M.* (2012) 54 Cal.4th 530, 540

technician, lifeguard, security officer, custody assistant, process server, traffic officer, code enforcement officer, animal control officer, or search and rescue member engaged in the performance of his or her duties, . . . and the person committing the offense knows or reasonably should know that the victim is a peace officer, custodial officer, firefighter, emergency medical technician, lifeguard, security officer, custody assistant, process server, traffic officer, code enforcement officer, animal control officer, or search and rescue member . . ., the battery is punishable by a fine not exceeding two thousand dollars (\$2,000), or by imprisonment in a county jail not exceeding one year, or by both that fine and imprisonment.”

⁴ The Education Code authorizes school districts to establish their own security and police departments, and to appoint their own “security officers.” (See Education Code, §§ 38000, subds. (a) & (b); 38001, subd. (b).)

[“public school security officers are not . . . employed by a county sheriff or city police chief”].)

Section 243’s definition of “security officer” contains no language suggesting that the statute was intended to apply to security personnel who are employed by a school district law enforcement agency, rather than a city or county law enforcement agency. Section 243.6, in contrast, specifically criminalizes batteries against school district employees,⁵ but the prosecution did not charge Pablo under that section. Instead, it elected to charge him under section 243, subdivision (b), and there is insufficient evidence to support that charge.

Although the Attorney General concedes error, he asserts that the appropriate remedy is not to reverse the juvenile court’s adjudication order, but rather to modify the adjudication to find that Pablo committed the lesser included offense of simple battery under section 242. “Where the evidence is insufficient to sustain the offense charged but shows that the defendant is guilty of a lesser included offense . . . , the court may reduce the crime rather than reverse outright.” (*People v. Yonko* (1987) 196 Cal.App.3d 1005, 1010; *People v. Bechler* (1998) 61 Cal.App.4th 373, 378-379; §§ 1159, 1260.) Pablo concedes that battery under section 242 is a lesser included offense to the charged crime of

⁵ Section 246.3 states, in relevant part: “When a battery is committed against a school employee engaged in the performance of his or her duties, or in retaliation for an act performed in the course of his or her duties, . . . and the person committing the offense knows or reasonably should know that the victim is a school employee, the battery is punishable by imprisonment in a county jail not exceeding one year, or by a fine not exceeding two thousand dollars (\$2,000), or by both the fine and imprisonment. . . .”

battery on an officer, and that there was substantial evidence to support a finding of simple battery.

We agree that the appropriate remedy is to modify the adjudication order to the charge of battery under section 242, and remand for a new disposition hearing.

B. The Juvenile Court's Denial of a Continuance Was Not an Abuse of Discretion

Pablo also argues we must reverse the adjudication based on the juvenile court's refusal to grant a continuance to enable the defense to call Pablo's grandmother as a witness.

1. Summary of applicable principles

Under Welfare and Institutions Code section 682, subdivision (b), the moving party must make a showing of good cause before a jurisdiction hearing may be continued. (See *In re Maurice E.* (2005) 132 Cal.App.4th 474, 480 (*Maurice E.*) ["section 682 and the corresponding rule of court . . . explicitly use the term 'good cause' as the necessary predicate for a continuance"].) When seeking a continuance "to obtain the presence of a witness, the moving party has the burden of showing that the following legal criteria have been satisfied: (1) That the movant has exercised due diligence in an attempt to secure the attendance of the witness at the trial by legal means; (2) that the expected testimony is material; (3) that it is not merely cumulative; (4) that it can be obtained within a reasonable time; and (5) that the facts to which the witness will testify cannot otherwise be proven." (*Owens v. Superior Court* (1980) 28 Cal.3d 238, 250-251; see also *In re Chuong D.* (2006) 135 Cal.App.4th 1303, 1312 (*Chuong D.*) [applying same factors in context of section 602 adjudication]; *Maurice E., supra*, 132 Cal.App.4th at pp. 480-481

[under section 682, “the standard for granting a continuance in juvenile court was to be the same as in ‘adult court’”].)

“The decision whether to grant a continuance of a hearing to permit counsel to secure the presence of a witness rests in the sound discretion of the trial court.” (*Chuong D.*, *supra*, 135 Cal.App.4th at p. 1312; see also *People v. Mungia* (2008) 44 Cal.4th 1101, 1118[.]) “In determining whether a denial [of a continuance] was so arbitrary as to deny due process, the appellate court looks to the circumstances of each case and to the reasons presented for the request. [Citations.]” (*People v. Frye* (1998) 18 Cal.4th 894, 1013.)

2. Pablo has failed to establish the court abused its discretion

As explained above, the court denied the continuance after expressing doubt regarding the credibility of the proffered testimony given its source and timing. More specifically, the court questioned why Pablo’s mother, who testified during the prosecution’s case-in-chief, was only now disclosing to defense counsel that the child’s grandmother had previously told her Najera said that the alleged battery was an accident.

The court’s statements demonstrate, implicitly if not explicitly, that it did not believe the grandmother’s expected testimony was material to the resolution of the case because such testimony would not change the court’s credibility determination regarding Najera. The court emphasized that it found Najera’s testimony during the adjudication to be clear, honest and credible, and further noted that there was no evidence suggesting Najera had any motivation to lie about what had occurred.

We find no abuse of discretion in the court’s determination that grandmother’s alleged statements regarding her

conversation with Najera, which mother and grandmother had never previously disclosed to any attorney, school employee, law enforcement agent or any other person involved in the proceedings, would not affect the court's determination of whether Najera was truthful during his testimony.

DISPOSITION

The adjudication order is modified to reflect a true finding on the offense of battery in violation of Penal Code section 242. As so modified, the adjudication order is affirmed. The disposition order is reversed, and the matter is remanded for a new disposition hearing and order.

ZELON, Acting P. J.

We concur:

SEGAL, J.

FEUER, J.